NO. 21074

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND R. FOWLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

On January 20, 1965, a five count indictment was returned against appellant by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2]. 1/

The indictment charged appellant with the violation of Federal narcotic laws relating to the possession and sale of heroin and cocaine [R. T. 2].

Appellant was convicted on all five counts by a jury on

1/ "C. T." refers to Clerk's Transcript.

June 25, 1965 [C. T. 16].

On June 25, 1965, appellant was sentenced to the custody of the Attorney General for seven years on each of the five counts, with the sentences to begin and run concurrently [C. T. 17].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231, Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4705(a) and 7237. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Section 174 of Title 21, United States Code, provides in pertinent part as follows:

> "Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitiates the transportation, concealment, or sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . ." shall be guilty of an offense.

Section 4705(a) of Title 26, United States Code, provides in pertinent part as follows:

> " . . . it shall be unlawful for any person

to sell, . . . narcotic drugs except in pursuance of a written order of the person to whom such article is sold . . . on a form to be issued in blank for that purpose by the Secretary or his delegate."

III

STATEMENT OF THE CASE

Appellant was indicted on January 20, 1965, by the Federal Grand Jury for the Southern District of California, Central Division. Counts One and Four of the five-count indictment charged that the appellant knowingly and unlawfully received, concealed, and facilitated the concealment and transportation of 24.400 grams of heroin on October 29, 1964, and 38.210 grams of heroin on December 3, 1964, respectively. Counts Two and Five of the indictment charged that the appellant knowingly and unlawfully sold and facilitated the sale of the aforementioned heroin on the said dates. Count Three of the indictment charged that the appellant knowingly and unlawfully sold 19.880 grams of cocaine on October 29, 1964, without obtaining from the purchaser a written order on a form issued for that purpose by the Secretary of the Treasury [C. T. 2].

Trial by jury was held on June 23, 24 and 25, 1965, before the Honorable Charles H. Carr, United States District Judge, at which time the appellant was convicted [C. T. 16].

On June 25, 1965, appellant was sentenced to the custody of the Attorney General for seven years on each of the five counts, with the sentences on Counts Two, Three, Four and Five to begin and run concurrently with the sentence on Count One [C. T. 17].

Appellant filed a timely notice of appeal on June 25, 1965 [C. T. 18].

IV

STATEMENT OF FACTS

Charles R. McConnell, a Federal Bureau of Narcotics agent for 16 years, was called as a Government witness and testified as follows:

On October 29, 1964, at approximately 1:00 P. M., he was in a shop on Adams Boulevard in Los Angeles with an informant by the name of Benjamin Clark and was working in an undercover capacity. The informant received a telephone call from someone, and McConnell heard the informant say, "Hello, I have been expecting you. I have the balance of the money I owe you. I also have a new customer for you. Bring a couple of those things over when you come. How long will it take?" [R. T. 57, 58, lines 17-20]. 2/

At approximately 1:30 P. M., on the same day the defendant arrived in a car which he parked in front of the shop [R. T. 58].

2/ "R. T." refers to Reporter's Transcript.

The defendant got out of the car and the informant went outside and shook hands with him. The informant came back into the shop with the defendant and introduced the defendant to Agent McConnell. The agent was using the name "Mac". The agent shook hands with the defendant and the three people walked to a bedroom in the rear of the store. Agent McConnell then asked the defendant what kind of a deal he could make the agent. The defendant replied, "What do you have in mind?" [R. T. 59]. The agent then said, "I could use either coke or H" [R. T. 59].

The defendant then called the informant aside and they had a conversation out of the agent's hearing. The defendant then left the shop and went outside. He returned a short time later and produced a number of rubber contraceptives and told the agent they contained good cocaine [R. T. 60]. The agent asked the defendant how much he wanted for the cocaine; the defendant said $1,100.00 an ounce. The agent and the defendant haggled about the price, and the defendant agreed to $550.00 an ounce. The defendant then produced two more rubber contraceptives which he said contained two ounces each of heroin [R. T. 60]. Agent McConnell told the defendant he would take one ounce of heroin and asked how much it would cost. The defendant said he would let the agent have one ounce of heroin and one ounce of cocaine for a total of $1,100.00. The defendant then sent the informant to the store to obtain more rubber contraceptives. When the informant returned, the defendant counted out 16 spoons of heroin and placed it in a rubber contraceptive which he then handed to Agent McConnell [R. T. 60].

The defendant produced what he said was four ounces of heroin and also five or six rubber contraceptives which allegedly contained one ounce of coke, or cocaine, each.

After the defendant gave Agent McConnell two rubber contraceptives, one allegedly containing heroin and the other containing cocaine, the agent counted out $1,100.00 to the defendant, which money was official advance funds obtained from the Bureau of Narcotics. The agent and the defendant then exchanged telephone numbers. The agent gave the defendant his home number in San Francisco, and the defendant gave a number in Los Angeles. Agent McConnell told the defendant he would be in touch with him. The defendant thereafter left the shop. Agent McConnell indicated that the serial numbers of the official advance funds had been recorded on a sheet at the Bureau of Narcotics office [R. T. 62-63]. It was stipulated that the goods sold contained heroin and cocaine [R. T. 55-56]. Agent McConnell did not give the defendant any written order form when he purchased the cocaine [R. T. 65].

On December 2, 1964, Agent McConnell called the defendant at the telephone number given to him by the defendant on October 29, 1964. The agent left a message that "Mac" had called. In the early morning hours of December 3, 1964, the defendant returned the agent's call. Agent McConnell asked the defendant if he had any cocaine. The defendant replied that he did, and that he had some fairly good heroin. The agent then indicated that he would be in Los Angeles later that day and would call the defendant

[R. T. 65, 67].

At approximately 3:30 P. M., on December 3, 1964, the agent called the defendant's telephone number from Norm's Restaurant at Sunset and Vermont in Los Angeles and left a message indicating the telephone number of the public booth he was calling from. A short time later the defendant called the agent at the public booth. The defendant told the agent to stay at the restaurant and the defendant would come there and pick him up in 20 minutes. The defendant came to Norm's Restaurant and picked up the agent. The defendant then drove to the vicinity of 750 North Wilcox in Los Angeles and parked in front of 750 North Wilcox. Agent McConnell told the defendant he would take two ounces of heroin. The defendant said that he had only cut heroin and told the agent, "I will let you have them both for $700.00" [R. T. 68]. The agent agreed, and the defendant got out of the car and went across the street to 747 Wilcox. The agent waited in the car. The defendant came back to the car and gave the agent a Tareyton cigarette package containing two rubber contraceptives containing heroin. The agent gave the defendant $700.00. The defendant then drove the car around the block and let the agent out [R. T. 69-70].

On the evening of December 13, 1964, Agent McConnell called the defendant's telephone number in Los Angeles and left a message that he had called. At approximately 1:30 A. M. on December 14, 1964, the defendant returned the agent's call. The agent told the defendant he could use ten ounces of heroin. The defendant replied that he could sell the agent eight ounces for

$2,700.00. The agent agreed and arranged to meet the defendant at 3:00 P.M. that day at the Los Angeles International Airport [R.T. 72-74].

On cross-examination Agent McConnell testified that he had been with the Bureau of Narcotics for 16 years and it was definitely not the practice of the Bureau to offer some type of leniency should the defendant arrange an arrest of another prospective defendant [R.T. 87]. The agent testified that he met the informant when he was called into the case by another narcotics agent; that he talked to the informant on October 28, 1964, and the informant said he had been buying narcotics from the defendant for quite some time. The informant told Agent McConnell that he did not think he would have any difficulty in introducing an agent to the defendant [R.T. 94-96]. The informant told Agent McConnell that as of October 28, 1964, he owed the defendant some money from a prior narcotic transaction [R.T. 96]. The agent said there was no conversation between the informant and himself regarding the informant's gaining some advantage from informing on the defendant [R.T. 79].

Francis L. Briggs, a Federal Bureau of Narcotics Agent for six years, was called as a witness by the Government and testified as follows:

On October 29, 1964, at approximately 1:00 P.M., he was located near the shop on Adams Boulevard in Los Angeles mentioned in the testimony of Agent McConnell. Agent Briggs saw the defendant arrive at the Adams Boulevard shop at

approximately 1:40 P. M. and then go into the shop. A short time later Agent Briggs observed the defendant come from the shop, go to his (the defendant's) car, open the passenger's door and stoop down in the front seat of the car. The defendant then stood up and went back into the shop where he remained until approximately 2:10 P. M., at which time he came out and got back in his car and drove away [R. T. 103-104].

On December 3, 1964, at approximately 3:25 P. M., Agent Briggs was in surveillance of Norm's Restaurant in the vicinity of Sunset and Vermont in Los Angeles. He observed the defendant arrive and park in front of the restaurant in a white, 1965 Ford, shortly before 4:00 P. M. The defendant got out of the car and went into the restaurant and sat down at a table with Agent McConnell. About ten minutes later the defendant and Agent McConnell left the restaurant, got into the defendant's automobile and the defendant drove to the 700 block of North Wilcox in Los Angeles where the defendant got out of the car and went into an apartment building at 747 North Wilcox. A short time later the defendant returned to the automobile and the vehicle became mobile. A few minutes later Agent Briggs met Agent McConnell who entered his vehicle and displayed a Tareyton cigarette package containing two rubber contraceptives which contained heroin [R. T. 105-107].

Agent Briggs identified a $50 bill which was part of the official advance funds used by Agent McConnell to purchase narcotics from the defendant on October 29, 1964, and which $50

bill was taken from the defendant at the scene of his arrest on December 14, 1964 [R. T. 107-115].

On cross examination Agent Briggs testified it was not the custom of the Bureau of Narcotics to offer leniency to defendants who became informants and that he did not make an offer of immunity in connection with this case [R. T. 117-118].

After the testimony of Agent Briggs the Government rested its case [R. T. 125].

Ben Clark, the informant, was called as a witness by the defense and testified as follows:

That he had been convicted about four times on marihuana charges [R. T. 138]. That one Claiborne White introduced the informant to the defendant in the latter part of 1964; the informant did not recall the month [R. T. 140-141]. The informant admitted introducing the defendant to federal officers, but denied that he ever received any pay or benefits from the officers. The informant testified that after meeting the defendant he made several narcotics transactions with him. On October 29, he still owed the defendant payment for these purchases [R. T. 142-144]. At the time of the meeting between the defendant, the informant and Agent McConnell in October, 1964, the defendant wanted to collect the money that the informant owed him. The informant agreed to pay as much as he had, and also asked the defendant if he had any heroin or cocaine to sell as Agent McConnell wanted to purchase some [R. T. 144]. The informant stated that he did not ask the defendant to sell narcotics to anyone, he only asked if the

defendant had anything to sell [R. T. 147]. The informant testified that the defendant always sold narcotics to him and that he never had any narcotics to sell to the defendant [R. T. 149].

The defendant, Raymond Ronald Fowle, testified as follows:

While at the home of Claiborne White, the defendant was told by White that the informant, Clark, was in some trouble concerning narcotics and if the informant could set someone up, the charge against him would be dropped. White said the informant needed someone to help him to set up some other people [R. T. 166]. Three or four days later, the informant and White came to the defendant's apartment to further discuss the informant's problem and to ask the defendant to assist the informant in setting someone up.

The defendant testified that the arrangement was for the defendant to receive the narcotics from the informant; the defendant would then sell the narcotics to Mac (Agent McConnell) and receive the money and give it to the informant; Mac would be arrested and the charge against the informant would be dropped. The defendant said he was then going to be a witness of the sale to Mac [R. T. 174]. The defendant testified he told the informant that he would be unable to get any narcotics. He said the informant told him that he would be able to furnish it [R. T. 174]. The defendant said the informant told him to act as if he were a big pusher and to pretend like he had many connections and that he was getting the narcotics from Mexico [R. T. 174-175]. The defendant

admitted passing the heroin and cocaine to Agent McConnell on October 29, 1964, but claimed he received the narcotics from the informant the previous day after the informant called him [R. T. 177-180]. The defendant said the informant told him how much to ask for the narcotics [R. T. 185].

The defendant testified that after he was contacted by Agent McConnell on December 2, 1964, he contacted the informant and said he needed two ounces of heroin. The defendant stated that the informant was in the Wilcox Street apartment and gave the defendant the heroin when he went there with Agent McConnell the afternoon of December 3, 1964 [R. T. 191-192].

The defendant stated he gave the money received from Agent McConnell to the informant after each sale and that after the transaction on October 29, 1964, the informant gave him $75.00 of the money for his part in the transaction [R. T. 174]. The defendant did not see or talk to the informant after December 3, 1964 [R. T. 195]. The defendant testified that the $1,082.00 found on him at the time of his arrest on December 14, 1964, was obtained from the sale of milk sugar, as heroin, to someone else the same day. Among the money was $50.00 of the money that the defendant had received from Agent McConnell on October 29, 1964, and given to the informant. The defendant testified he did not have the heroin to sell on December 14, 1964, because he could not contact the informant to get more [R. T. 198-202]. The defendant denied ever selling narcotics to the informant [R. T. 212].

The defendant testified that on May 10, 1965, he had a

discussion with federal narcotics officers in their office regarding the possibility of his obtaining leniency if he would introduce the federal agents to a possible defendant [R. T. 213].

On cross-examination the defendant stated that on October 29, 1964, he had known the informant approximately one month and that the informant owed him $800 because he had given money to the informant to obtain cocaine for him and the informant reneged. The defendant testified that he did not call the informant at the Adams Boulevard shop on October 29, 1964, but that the informant called him [R. T. 217-219].

The defendant stated that on December 3, 1964, he was residing at 1308 Poinsettia in Los Angeles, but that on the same date he was renting the apartment at 747 North Wilcox under the name of Robert Juan. He denied the Wilcox apartment was being used as a "stash pad" (a place for storing narcotics or stolen goods) [R. T. 216].

The defendant stated that on October 29, 1964 and December 3, 1964, he understood that the informant was working with law enforcement officers and that he was assisting the informant in working with officers [R. T. 219-221]. The defendant testified that at no time did he meet or talk with any officers or other law enforcement people either before October 29, 1964, or between October 29, 1964 and the date of his arrest on December 14, 1964 [R. T. 221-222].

The defendant stated that the heroin and cocaine he sold to Agent McConnell on October 29, 1964, he obtained from the

informant and that he had no other source for cocaine at that time nor did he have any other source for heroin. The defendant said he had no source, other than the informant, for the heroin sold to Agent McConnell on December 3, 1964 [R. T. 222-223].

The defendant testified that the sales of narcotics on October 29 and December 3, 1964, were the only sales of narcotics he made between the beginning of October and the end of December, 1964 [R. T. 223-224].

The defendant stated that at the time of his arrest on December 14, 1964, he was advised that he was arrested for selling narcotics, and at that time he realized he had not been working with law enforcement officials on the sales to Agent McConnell on October 29 and December 3, 1964, but that he had been set up [R. T. 224-225]. The defendant was then cross-examined as follows:

> "Q. . . . At the time of your arrest, Mr. Fowle, did you tell the agents that you were setting up Mac with Mr. Clark?
>
> "A. No, I didn't." [R. T. 228].

The defendant was then asked:

> "Q. Mr. Fowle, isn't it a fact that on December the 15th of 1964, when you were no longer in custody, that you told Agent Briggs and Saiz that David Soto Vasquez was your main connection in Tijuana?

"A. Not to my recollection.

* * * * *

"Q. Now isn't it a fact, Mr. Fowle, that subsequent to November of 1964 you sold narcotics to a man named Roger Angel?

"A. Roger Angel, no.

* * * * *

"Q. Isn't it a fact, Mr. Fowle, that you told Mr. Hess, seated here in court (indicating), on February the 3rd of 1965 that you had sold narcotics to Roger Angel after November of 1964?

"A. No." [R. T. 229-230].

The defendant testified that the agents returned to him part of the money that was taken from his person at the time of his arrest, and that he used the money to bail himself from jail [R. T. 225-226].

The defendant was cross-examined as follows concerning his being advised, at the time of his arrest, of his constitutional rights:

"Q. On the date of December the 14th of 1964, at the time of your arrest, you were advised by the federal agents that you did not have to say anything, and that anything you said could be used against you, were you not?

"A. Yes, I was.

"Q. On the date of December the 14th, at the time of your arrest, you were also told that you had a right to counsel?

"A. I told them I didn't want to mention anything --"

On redirect examination the defendant testified that he had heard the name Robert Angel when he talked to Special Agent Lawrence Hess of the United States Secret Service about a group of people that were dealing in counterfeit money. The defendant stated, "And it wasn't nothing about narcotics that we were discussing" [R. T. 232, lines 3-4]. The defendant recalled that the conversation took place at a restaurant, but he could not remember the date. The defendant stated that he had previously heard the name David Soto Vasquez during a conversation between Claiborne White, the informant and himself. He could not recall when he had first heard the name. He said that Vasquez was supposed to be a connection in Tijuana and that White and the informant had given him Vasquez's phone number in the event he had to go down there and contact him [R. T. 232-234].

The defense called as witnesses, Joleen Kottman, Violette LeBeau and Hope Kolsiana, all of whom testified to the effect that they were present together at the defendant's apartment on some evening between October 15 and October 29, 1964, that Claiborne White and the informant came to the defendant's apartment while they were present, that they overheard the defendant say to White

and the informant that he did not know how he could help them, that thereafter either White or the informant said, "I can get it for you, don't worry about where you get it" [R. T. 244]. "I got the stuff" [R. T. 262, 237-280]. Joleen Kottman also testified that around May 10, 1965, she was with the defendant in the office of the Bureau of Narcotics when she heard Agent Briggs say to the defendant, "I don't want any more foolishness and it had to be bona fide information or help" [R. T. 248].

The informant, Ben Clark, was recalled as a witness by the defense and admitted going to the defendant's apartment with Claiborne White. He stated that he went there only once, and it was before October 29, 1964. The informant stated that neither Joleen Kottman, Violette LeBeau nor Hope Kolsiana was present at the defendant's apartment on that occasion. The informant said he went to the defendant's apartment at the defendant's invitation. The informant stated that he did not tell the defendant that he was in trouble with the law when he went to the defendant's apartment. The informant stated that he had not talked to federal agents prior to meeting at the defendant's apartment [R. T. 283-295].

On cross-examination the informant denied that he ever asked the defendant to help him set up anyone [R. T. 297].

On redirect examination the informant stated that the narcotics he bought from the defendant he sold to other people [R. T. 300].

Agent Briggs was called as a defense witness and stated that the first time he ever talked to the informant was on the

evening of October 28, 1964. Agent Briggs testified on cross-examination that the informant was arrested on October 26, 1964 [R. T. 301-302].

The defense rested its case after the testimony of Agent Briggs [R. T. 304].

In rebuttal, the Government called Lawrence Hess who identified himself as a special agent with the United States Secret Service in Los Angeles and testified that he met the defendant at a coffee shop in the Hollywood area on February 3, 1965, where the defendant introduced him to a man named Norman Sugarman, whom the defendant said was his attorney. Agent Hess then had a conversation with the defendant; however, the attorney was not present at that time [R. T. 304-306]. Before allowing Agent Hess to testify as to statements made to him by the defendant, the court questioned the agent as follows:

"THE COURT: First, were you assigned to investigate the case?

"THE WITNESS: Not regarding narcotics, sir.

"THE COURT: I see. Two: Was the defendant under arrest at that time?

"THE WITNESS: No, sir.

"THE COURT: Was the defendant charged at that time?

"THE WITNESS: No, sir.

"THE COURT: As far as you know.

"THE WITNESS: No."

Thereafter, Agent Hess testified that on February 3, 1965, the defendant told him that in November of 1964 he had sold narcotics to Roger Angel [R. T. 306-307].

On cross-examination Agent Hess testified that his investigation of the defendant was in connection with his duties as a Secret Service Agent and had nothing to do with narcotics. His investigation was concerning the defendant's possible involvement with counterfeit money [R. T. 308-309].

In rebuttal, the Government recalled Agent Briggs who testified that he talked to the defendant on December 15, 1964, which was subsequent to his arrest and arraignment before the Commissioner and subsequent to his release on bond. The conversation with defendant was held in the office of the Federal Bureau of Narcotics in Los Angeles. Agent Briggs testified that the defendant told him on December 15, 1964, that David Soto Vasquez was his main source or connection and that Vasquez was in Tijuana [R. T. 312-313].

V

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN PERMITTING THE PROSECUTION TO INTERROGATE THE DEFENDANT AS TO WHETHER, AT THE TIME OF HIS ARREST, HE TOLD THE FEDERAL AGENTS THAT HE WAS WORKING WITH THEM TO SET UP SOMEONE.

As his defense, the defendant sought to establish that he had been unlawfully entrapped, or more accurately, framed into selling narcotics to a Federal Agent on October 29, 1964, and December 3, 1964. The defendant testified that the informant had come to him and explained he was in trouble involving narcotics and needed someone to help him set up a third person in order to get the charge against him dismissed [R. T. 166, 172]. The defendant testified that he agreed to help the informant. The arrangement was for the defendant to receive narcotics from the informant and sell them to a third party; thereafter the defendant would give the money received from the purchaser to the informant. The defendant stated that as a part of the arrangement the purchaser would be arrested and the charge against the informant would be dismissed. The defendant was then supposed to be a prosecution witness against the purchaser [R. T. 174]. The defendant testified that he understood the informant was working with law enforcement officers and that he was assisting the informant in working with the officers [R. T. 219-221]. Thereafter, the prosecution, over defense

counsel's objection asked the defendant whether at the time of his arrest, he told the federal agents that he was working with them in attempting to set up someone. The defendant replied that he did not [R. T. 228]. The defense claims on appeal that the trial court erred in allowing the question to be asked.

It is very clear that the prosecution's purpose in asking the defendant the indicated question was solely for impeachment of the defendant's story as to entrapment or being framed. To conclude that a person would not be totally shocked and dismayed if he were arrested by law enforcement officers who he thought he was working with, and would not attempt to communicate to the officers that he was working with them, flies in the face of reason. Clearly, the inference to be drawn from the objected to question and answer was that the defendant's story of entrapment was a fabrication.

Appellee is mindful of the defendant's right to remain silent when under arrest without making an express claim of his privilege against self-incrimination. Appellee is also aware of the impropriety of comment by the prosecution that the defendant has elected to remain silent. Griffin v. California, 380 U.S. 609 (1965). However, defendant's admitted silence at the time of his arrest was not introduced by the prosecution to suggest that the defendant must be guilty of the charges against him, otherwise he would not have remained silent upon arrest. Rather, the fact of defendant's silence at the time of his arrest was introduced entirely for the purpose of suggesting that if defendant's lengthy testimony

of helping law enforcement officers by setting up another person was true, he would certainly have expressed this fact to the officers at the time of his arrest.

Appellee maintains that the arrest of the defendant was so accusatory as to compel a statement from the defendant at that time that he was working with law enforcement officers. The prosecution's questioning of the defendant as to his silence at the time of his arrest strongly suggests that the defendant's defense was sheer fabrication.

B. THE TRIAL COURT DID NOT ERR IN PERMITTING AGENT BRIGGS TO TESTIFY CONCERNING HIS CONVERSATION WITH THE DEFENDANT ON DECEMBER 15, 1964.

On direct examination by his counsel, the defendant testified that when Claiborne White and the informant came to his apartment prior to October 29, 1964, the defendant allegedly told the informant that he would be unable to get any narcotics. The defendant testified that the informant told him he would be able to furnish it. The defendant said the informant told him to pretend as if he had many connections and that he was getting the narcotics from Mexico [R. T. 174-175]. The defendant admitted passing narcotics to Agent McConnell on October 29 and December 3, 1964, but claimed that he received the narcotics from the informant. The defendant alleged that this was all part of a plan whereby he was to help the informant in working with law enforcement officers.

On cross-examination the defendant repeated his claim that he had no source for narcotics other than the informant [R. T. 222-223]. The defendant testified on cross that he did not recollect telling Agent Briggs, on December 15, 1964, that David Soto Vasquez was his main source [R. T. 228].

The clear import of the cross-examination was to impeach the defendant's testimony that he had no source of narcotics other than the informant. By calling Agent Briggs on rebuttal to testify that the defendant had stated to him that David Soto Vasquez was his main source, the prosecution was not only seeking to impeach the defendant's denial of having made the statement, but also to impeach the credibility of his whole story on direct examination concerning entrapment or frame-up.

Furthermore, the defendant is precluded from objecting to penetrating inquiry into his conduct when he has raised the issue of entrapment.

> " . . . if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."
>
> Sorrell v. United States, 287 U.S. 435, 451 (1932).

"When the defense of entrapment is enterposed, the predisposition and criminal design of the defendant becomes relevant and the government may introduce evidence relating to the conduct and the predisposition of the defendant as it bears upon the issue of entrapment. The record and the reputation of the defendant became important upon this issue in rebuttal.

Ryles v. United States, 183 F. 2d 944 (10th Cir. 1950), cert. denied 340 U.S. 877.

It is contended that the language of the above-cited cases applies with equal logic to the situation where, as here, the defendant has raised the issue of frameup.

C. THE TRIAL COURT DID NOT ERR IN PERMITTING AGENT HESS TO TESTIFY CONCERNING HIS CONVERSATION WITH THE DEFENDANT ON FEBRUARY 3, 1965.

On cross-examination the defendant testified that the sales of narcotics on October 29 and December 3, 1964, were the only sales of narcotics he made between the beginning of October and the end of December, 1964 [R. T. 223-224]. The defendant subsequently denied that he had sold narcotics in November, 1964, to a man named Roger Angel. The defendant further denied that he told Agent Hess on February 3, 1965, that he had sold narcotics to Roger Angel in November, 1964. No objections were made by

defense counsel to this questioning of the defendant [R. T. 229-230].

In rebuttal, the Government called Lawrence Hess, a special agent with the United States Secret Service, who testified that on February 3, 1965, he had a conversation with the defendant in which the defendant told him that he had sold narcotics to Roger Angel in November, 1964 [R. T. 306-307].

The prosecution's purpose in introducing the testimony of Agent Hess was clearly to impeach the defendant's denials on cross. The impeachment of the defendant's denials concerning the sale of narcotics to Roger Angel in November, 1964 would obviously attack the credibility of the defendant's story concerning entrapment. If the jury did believe the testimony of Agent Hess concerning his conversation with the defendant, they could find that the defendant lied not only as to having made the sale to Roger Angel, but also concerning his alleged relationship with the informant whereby the informant supplied him with the narcotics to make the sales on October 29 and December 3, 1964. In accepting the testimony of Agent Hess, the jury could discredit the testimony of the defendant that he was not disposed to sell narcotics except for the inducement by the informant.

As indicated in Section B hereinabove, since the defendant raised the issue of entrapment, or possibly frameup, he cannot object to searching inquiry concerning his own conduct and predisposition. See the language of Sorrell v. United States, supra, and Ryles v. United States, supra, quoted hereinabove.

D. THE ADMISSION OF DEFENDANT'S STATEMENTS TO AGENT BRIGGS AND TO AGENT HESS WAS NOT MADE IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS.

The trial of the defendant took place in June, 1965. Therefore, Miranda v. State of Arizona, 384 U.S. 436, is not applicable. Johnson v. State of New Jersey, 384 U.S. 719.

The defendant's conversation with Agent Briggs occurred after the defendant had been arraigned and released on bond. The defendant was not in custody at the time of the conversation [R. T. 229, 312-313]. Furthermore, there is no showing in the record that the defendant ever asked for or was denied the assistance of counsel at the time of his conversation with Agent Briggs.

The admission of the defendant's conversation with Agent Briggs did not violate his sixth amendment right to counsel as expressed in Escobedo v. Illinois, 378 U.S. 478.

The defendant's conversation with Agent Hess on February 3, 1965 occurred while the defendant was at liberty on bond. The defendant himself testified that the conversation with Agent Hess was about people who were dealing in counterfeit money. The defendant stated, "And it wasn't nothing about narcotics that we were discussing" [R. T. 232]. Agent Hess testified that at the time of his conversation with the defendant, he was not assigned to the investigation of the narcotics charges pending against the defendant. He stated that the defendant was neither under arrest nor charged at the time of the conversation. His investigation concerned the

defendant's possible involvement with counterfeit money [R. T. 306-309]. Agent Hess testified that he was introduced to defendant's attorney at the time of the conversation, but that the attorney was not present during the conversation. There is no showing in the record that defendant was denied the assistance of his counsel at the time of the conversation. The fact that the defendant was advised of his right to counsel at the time of his arrest [R. T. 226], and the fact that defendant's attorney was present immediately before his conversation with Agent Hess gives rise to the inference that the defendant was fully aware of his constitutional rights at the time of the conversation.

The admission of the defendant's conversation with Agent Hess, as in the case of his conversation with Agent Briggs, did not violate his sixth amendment right to counsel.

E. THE DEFENDANT'S OBJECTION TO THE LANGUAGE USED IN THE TRIAL COURT'S INSTRUCTION ON ENTRAPMENT IS NOT PROPERLY RAISED ON APPEAL.

The instruction on the law of entrapment was based substantially upon "Jury Instructions and Forms for Federal Criminal Cases", by the Honorable William C. Mathes [R T. 407-408].

It is recognized that the decision of this Court in Notaro v. United States, 362 F. 2d 169, has resulted in a modification of that instruction in order to properly cast the burden of proof on the prosecution. However, the objection raised in Notaro, supra, was

not raised in the trial of the instant case, nor has the objection been raised on appeal; therefore, the correctness of the trial court's instruction in that regard is not before this Court on appeal.

Robison v. United States, ___ F. 2d ___,
decided May 18, 1967 (9th Cir.)
Docket No. 20,752;
Rule 30, Federal Rules of Criminal Procedure.

During the trial, the defense raised an objection to the first paragraph of the entrapment instruction wherein the trial court instructed as follows:

> "Where a person has no previous intent or purpose to violate the law, but is induced or is persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids conviction in such a case." [R. T. 407].

The defendant's objection at trial was that the paragraph should have stated the lack of intent to commit the crime charged in the indictment, not simply the lack of intent to violate the law. On appeal, however, the defense raises for the first time an objection to the language used in the fifth paragraph of the instruction wherein the trial instructed as follows:

> "If on the other hand the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so, only because he was induced or persuaded

by some agent of the Government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good defense and the jury should acquit the accused." [R. T. 408].

Therefore, the defendant's objection on appeal to the language of the entrapment instruction is not timely and is precluded by Rule 30, Federal Rules of Criminal Procedure.

Johnson v. United States, 291 F. 2d 150
(C. A. 8th 1961);

Reid v. United States, 334 F. 2d 915
(C. A. 9th, 1964).

Johnson, supra, at page 156, states as follows:

"Rule 30, Federal Rules of Criminal Procedure, 18 U. S. C. A., provides in part:

" 'No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.' "

"The purpose of the quoted portion of the rule is to give the trial judge a fair opportunity to correct any mistakes in his charge. An exception which does not fulfill this purpose does not entitle the party to a review of the instruction."

In the absence of plain error, failure to object to the alleged defect in the court's instruction at trial forecloses the defendant's right to object thereto on appeal.

Phillips v. United States, 334 F.2d 589 (9th Cir. 1964), cert. denied 379 U.S. 1002;

Renteria-Medina v. United States, 346 F.2d 853 (9th Cir. 1965).

F. ASSUMING ARGUENDO, A DEFECT IN THE TRIAL COURT'S INSTRUCTION ON THE LAW OF ENTRAPMENT, SAID DEFECT DOES NOT CONSTITUTE PLAIN ERROR AS EXPRESSED IN RULE 52(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

At the time defendant requested an instruction on entrapment the trial court agreed to give such an instruction, but stated to defense counsel, "This is not an entrapment case, if I ever saw one . . . . This is as far from being an entrapment case as I have ever seen." [R.T. 331].

In his defense, the defendant testified that he knew that the informant was working with law enforcement officers on October 29 and December 3, 1964 [R.T. 219-221]. As stated in Reid v. United States, 334 F.2d 915 (9th Cir. 1964) at page 916:

> "It is difficult to understand how one could be 'entrapped' by another known by him at the time to be working with law enforcement officers."

In the defendant's defense, he did not admit the commission of the crime. Rather, his defense was to the effect of claiming "frameup". By the defendant's own testimony he stated that he knew the informant was working with law enforcement officers on the dates of the sales to Agent McConnell, and that he was assisting the informant in working with the officers. What the defendant said, in effect, was that the sales made by him on October 29, and December 3, 1964, were not crimes at all, but were activities in furtherance of an arrangement with law enforcement officers to set up prospective defendants. Under such a state of facts, the trial court properly could have denied defendant's request for an instruction on entrapment.

Absent the defendant's admission of a crime, there can be no entrapment.

Ortega v. United States, 348 F. 2d 874
(9th Cir. 1965);

Ortiz v. United States, 358 F. 2d 107
(9th Cir. 1966);

Garibay-Garcia v. United States, 362 F. 2d 509
(9th Cir. 1966).

VI

CONCLUSION

For the reasons stated herein, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James E. Shekoyan

JAMES E. SHEKOYAN